Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

JAMES NEWSOME,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
JANE ELINOR NOTZ
Assistant Corporation Counsel
City Hall, Room 600
Chicago, Illinois 60602
(312) 744-5337

Attorneys for Petitioners

* Counsel of Record

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QUESTION PRESENTED

Whether damages can be awarded against police officers under 42 U.S.C. § 1983 for depriving an accused of his right to a fair trial by failing to disclose exculpatory information to prosecutors.

PARTIES TO THE PROCEEDING

The petitioners are the City of Chicago, Helen McCabe (as personal representative of the estate of John McCabe), and Raymond McNally. The respondent is James Newsome.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the City of Chicago, Helen McCabe (as personal representative of the estate of John McCabe), and Raymond McNally, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit (App., *infra* at 1a-21a) are reported at 319 F.3d 301 (7th Cir. 2003); 260 F.3d 824 (7th Cir. 2001); and 256 F.3d 747 (7th Cir. 2001). The pertinent opinions of the district court (App., *infra* at 22a-91a), are unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 10, 2003. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (2000).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. Section 1 of the Civil Rights Act of 1871, as amended, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2000).

STATEMENT

In this case, the court of appeals upheld a $15 million judgment against two Chicago police detectives, concluding that the detectives were liable for the unconstitutional conviction of respondent James A. Newsome ("Newsome") by failing to disclose exculpatory evidence to the prosecutors handling the underlying criminal case against Newsome.

1. In October 1979, Edward "Mickey" Cohen ("Cohen") was fatally shot during a robbery at his grocery store. App., *infra* at 10a. In September 1980, Newsome was convicted of Cohen's murder. *Id.* Newsome's conviction was based

largely on the testimony of three eyewitnesses, Josie Nash ("Nash"), Anthony Rounds ("Rounds"), and John Williams ("Williams"). App., *infra* at 2a-3a. Nash and Rounds were in Cohen's grocery store at the time of the shooting, and Williams bumped into a man matching the killer's description outside the store shortly before the shooting. Tr. 126, 186, 816-23. All three witnesses identified Newsome as the killer, first from a police lineup and later at Newsome's criminal trial. App., *infra* at 2a-3a; Tr. 120, 126, 129-30, 145, 193, 818, 824, 845. The evidence introduced at the murder trial also showed, however, that fingerprints found on grocery items touched by the killer were not Newsome's. Tr. 900.

In 1995, the Governor of Illinois pardoned Newsome after a new computerized fingerprint identification system enabled the Chicago Police Department to compare the fingerprints found at the crime scene to all prints on file with the Department and identify the fingerprints as belonging to a convicted murderer named Dennis Emerson. App., *infra* at 1a; Tr. 342-50.

2. Newsome brought this suit against Chicago police detectives John McCabe and Raymond McNally, who had arranged the lineup identification procedure at which Nash, Rounds, and Williams identified him as Cohen's killer. App., *infra* at 11a. Newsome alleged that Detectives McCabe and McNally were liable for a malicious prosecution in violation of his constitutional rights and sought relief under 42 U.S.C. § 1983 (2000). App., *infra* at 10a-11a.

The detectives moved for summary judgment on the ground of qualified immunity. *See* App., *infra* at 22a-23a, 54a. The district court denied the motion, ruling that evidence that the detectives had encouraged the witnesses to select Newsome from the lineup but failed to tell the prosecutors about the circumstances underlying the lineup identifications was sufficient to support section 1983 liability for a malicious prosecution under clearly established law in

1979 and 1980. See App., *infra* at 56a. On the detectives' interlocutory appeal, the court of appeals rejected the theory of malicious prosecution on which the case had been brought, concluding that section 1983 does not recognize the theory of malicious prosecution on which the district court and Newsome had relied. App., *infra* at 12a-16a. Nevertheless, the court upheld the denial of qualified immunity, holding that the detectives could be held liable for depriving Newsome of his due process right to a fair trial under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence. App., *infra* at 16a-18a. The court held that the detectives could be legally responsible for depriving Newsome of his constitutional right to a fair trial if they had encouraged the eyewitnesses to select Newsome from the lineup "yet withheld from prosecutors information about the coaching of the witnesses and the fact that these witnesses earlier selected pictures from a book of mug shots that did not contain Newsome's photo." App, *infra* at 11a.[1] The court also concluded that such conduct would have violated clearly established law at the time of Newsome's prosecution: "The *Brady* principle was announced in 1963, and we applied it in *Jones* [*v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988)] to affirm a hefty award of damages against officers who withheld exculpatory information in 1981," App., *infra* at 17a-18a.

The detectives filed a petition for rehearing, arguing that the obligation to disclose exculpatory evidence to the defense that was recognized in *Brady* is applicable to prosecutors, not police. App., *infra* at 19a. The court of appeals denied the petition in a supplemental opinion, explaining that "if the right characterization of the defendants' conduct is that they

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[1] The court also held that the detectives could be liable if they withheld from prosecutors exculpatory information relating to the fingerprints found at the scene. App., *infra* at 11a.

deliberately withheld information, seeking to misdirect or mislead the prosecutors and the defense, then there is a genuine constitutional problem." App., *infra* at 20a.

3. After the case returned to the district court, Newsome amended his complaint to advance the due process theory that had been fashioned by the court of appeals. App., *infra* at 67a. His amended complaint was met by a motion asserting absolute immunity from liability on that theory. App., *infra* at 66a. The district court ruled that the allegations in the complaint that the detectives suborned and conspired to procure perjurious testimony against Newsome were barred by absolute immunity, but that absolute immunity did not reach allegations that the detectives had deliberately concealed exculpatory evidence. App., *infra* at 66a-70a.

At trial, Newsome testified that he saw Detectives McCabe and McNally point and gesture at him while Nash viewed the lineup. Tr. 539. Rounds, who admitted that he had participated in the creation of a composite sketch of the killer prior to the lineup, Tr. 188, 204-06, nevertheless testified that when he first viewed the lineup, he told the detectives that he had never seen the killer's face and identified Newsome only because the detectives urged him to "focus on No. 3" (Newsome) and told him that they had evidence that "No. 3" was the killer. Tr. 190-94, 21-12.[2] When asked why he had not told the prosecutors that he had not really seen the man who murdered Cohen, Rounds answered: "Because I was told by the police I would be charged with perjury or something or contempt of court." Tr. 194. Rounds's account of coaching by the detectives was impeached with his testimony from the criminal proceedings, where he had testified that the police

[2] The detectives' testimony was that they had no independent recollection of the circumstances underlying the lineup identifications occurring more than 20 years earlier. Tr. 343-47, 877-89. The pertinent police report they filed says nothing about what may have preceded the witnesses' identifications. Tr. 404-09.

did not say anything to him while he viewed the lineup other than to take his time, look closely, and let them know if he recognized anyone. Tr. 211-15, 238-40. The evidence further showed that Nash (who had died by the time of the civil trial) had testified during the criminal proceedings that no one had told her whom to identify from the lineup and that the police had said nothing to her during the lineup other than to tell her to take her time. Tr. 174, 182. Finally, the evidence showed that, prior to the criminal trial, the prosecutors had interviewed each of the eyewitnesses individually—out of the presence of the detectives—and that no witness had told the prosecutors that the police had instructed him or her whom to pick from the lineup. Tr. 895-98.[3]

The jury was instructed that it could find the detectives liable for violating Newsome's constitutional rights if it found that the detectives "deliberately concealed or failed to disclose . . . exculpatory evidence . . . ." Tr. 1133. The jury awarded Newsome $15 million in compensatory damages. App., *infra* at 2a.[4]

4. The court of appeals affirmed. On the detectives' arguments in support of their claim to qualified immunity, the court held that the detectives had "preserved them for

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[3] The evidence at trial also showed that much of the exculpatory information that the court of appeals speculated in the interlocutory appeal might have been suppressed by the detectives was in fact disclosed during the criminal proceedings. For example, the evidence showed that Detective McCabe disclosed that the detectives had shown Williams a photo array containing Newsome's photograph prior to the lineup. Tr. 871-72. Similarly, the evidence showed that, although Nash and Rounds may have identified someone other than Newsome when viewing mug books, that fact was also fully disclosed to the defense during the criminal proceedings. Tr. 110-13, 136-39, 163-64, 871-72. Finally, Newsome never alleged that the detectives had withheld any exculpatory information relating to the fingerprints, and no such claim was pressed at trial.

[4] The district court subsequently awarded Newsome $837,533.27 in attorney's fees and $12,382.75 in costs. R. 291.

presentation to a higher court, but in this tribunal they are barred by the law of the case." App., *infra* at 2a. And, on the detectives' claim to absolute immunity for their role in procuring testimony that was ultimately used to convict Newsome, the court ruled that the defense was inapplicable because the detectives "were not held liable for conspiring with the eyewitnesses to commit perjury." App., *infra* at 5a. Instead, the court concluded that liability attached because the detectives "concealed exculpatory evidence—the details of how they induced the witnesses to finger Newsome." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents issues of recurring importance concerning the circumstances under which an accused may recover damages from police officers for a subsequently vacated conviction. The lower courts have struggled unsuccessfully to reach a uniform approach to these issues, and there is considerable disarray in the circuits on the question presented in this petition. The need for this Court's guidance is urgent. Given the advent of DNA testing to overturn criminal convictions years or even decades after a criminal trial, litigation challenging assertedly wrongful convictions is burgeoning. Moreover, the stakes for the parties, and for the taxpayers as well, are quite high in these cases; here the jury assessed the damages for wrongful confinement at $1 million per year. This Court should clarify the standards governing these cases before too much more litigation is undertaken under liability and immunity rules that may well prove to be erroneous and that vary considerably between circuits.

1. As one Member of this Court has observed, a section 1983 claim against police officers based on an assertedly unconstitutional prosecution "is anomalous," since "[t]he principal player in carrying out a prosecution . . . is not police officer but prosecutor." *Albright v. Oliver*, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring). The disarray in the lower

courts in cases seeking damages for assertedly unconstitutional prosecutions and convictions reflects the difficulty in framing and analyzing this type of claim.

a. This Court first confronted the question whether federal law provides a remedy for an assertedly unconstitutional prosecution in *Albright*. In that case, a section 1983 action seeking damages for an allegedly wrongful prosecution that was terminated prior to trial, five Members of this Court rejected the Due Process Clause as a basis to sue police officers for an unconstitutional prosecution, reasoning that deprivations of liberty accompanying the initiation of criminal proceedings are governed by the Fourth Amendment and not the Due Process Clause. See 510 U.S. at 274-75 (plurality opinion); *id.* at 290-91 (Souter, J., concurring in the judgment). Six Members of the Court added that the question whether a due process section 1983 claim is available to a plaintiff who alleges that he was deprived of his constitutional right to a fair trial was not presented by that case. See *id.* at 273 n.6 (plurality opinion); *id.* at 818 (Kennedy, J., concurring in the judgment).

In the wake of *Albright*, the courts of appeals have diverged sharply on the standards governing section 1983 claims seeking damages against police officers for assertedly unconstitutional prosecutions and convictions. In this case, the Seventh Circuit held that, although a malicious prosecution claim arising from an unconstitutional prosecution and conviction can be based on the Fourth Amendment, such a claim accrues at the time an accused is first taken into custody, and for that reason Newsome's Fourth Amendment claim was barred by the statute of limitations. App., *infra* at 16a. Following the analysis offered by two Members of the Court in *Albright*, the court of appeals also held that no procedural due process claim was available to Newsome because Illinois tort law provided Newsome with all the process that he was due. App., *infra* at 14a (citing *Albright*,

510 U.S. at 281-86 (Kennedy, J., concurring in the judgment)). The Seventh Circuit also concluded, however, that Newsome could assert "a due process claim in the original sense of that phrase" because "he did not receive a fair trial if the prosecution withheld material exculpatory details." App., *infra* at 16a. This conclusion finds no universal acceptance in the circuits.

In fact, of the eight circuits to address these types of claims, only two have held that a section 1983 claim seeking damages for an unconstitutional prosecution and conviction may be based on constitutional provisions other than the Fourth Amendment. The Third Circuit has recognized a section 1983 malicious prosecution claim based on "police conduct that violates the Fourth Amendment, the procedural due process clause or other explicit test of the Constitution." *Torres v. McLaughlin*, 163 F.3d 169, 173 (3d Cir. 1998), cert. denied, 528 U.S. 1079 (2000). The Sixth Circuit has similarly held that, although a section 1983 malicious prosecution claim may be based on the Fourth Amendment, the claim may be pursued under the substantive component of the Fourteenth Amendment in cases where the violation of Fourth Amendment rights is not at issue. See *Frantz v. Village of Bradford*, 245 F.3d 869, 875-77 & n.2 (6th Cir. 2001).

By contrast, six circuits have interpreted *Albright* to require that claims like the one Newsome originally brought, alleging a malicious prosecution unsupported by probable cause, be analyzed under the Fourth Amendment and not the Due Process Clause, although these circuits are themselves split on whether this claim can be based exclusively on the Fourth Amendment or must also allege the elements of the state-law tort of malicious prosecution. The First, Second, Tenth, and Eleventh Circuits have indicated that, to sue police officers for their role in inducing prosecutors to bring a criminal case, a section 1983 plaintiff must prove a Fourth Amendment violation plus all of the elements of the state-law tort of

malicious prosecution. See *Fulton v. Robinson*, 289 F.3d 188, 195 (2d Cir. 2002); *Nieves v. McSweeney*, 241 F.3d 46, 53-54 (1st Cir. 2001); *Uboh v. Reno*, 141 F.3d 1000, 1002-04 (11th Cir. 1998); *Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir.), cert. denied, 519 U.S. 871 (1996). The Fourth Circuit has held that the plaintiff must prove a Fourth Amendment seizure plus the termination of the prior criminal proceedings in a manner favorable to the plaintiff. See *Lambert v. Williams*, 223 F.3d 257, 262 (4th Cir. 2000), cert. denied, 531 U.S. 1130 (2001). And the Fifth Circuit has held that the plaintiff must prove the requirements of the state-law tort and no more. See *Castellano v. Fragozo*, 311 F.3d 689, 698-99 (5th Cir. 2002), rehearing en banc granted, 321 F.3d 1203 (5th Cir. 2003).

b. Not only is there disarray in the lower courts about how a section 1983 claim against police officers for an allegedly wrongful prosecution and conviction should be treated, but there is also considerable disagreement about the particular theory of due process liability utilized by the Seventh Circuit in this case.

To support its view of due process liability in this case, the Seventh Circuit relied on the responsibility imposed on prosecutors in *Brady v. Maryland*, 373 U.S. 83 (1963), "for learning of and disclosing all exculpatory evidence known to the police." App., *infra* at 16a. Although acknowledging that *Brady* articulates a prosecutorial and not investigative responsibility, the court believed that police could be taxed with liability under *Brady*:

> If officers are not candid with prosecutors, then the prosecutors' decisions—although vital to the causal chain in a but-for sense—are not the important locus of action. Pressure must be brought to bear elsewhere. Prosecutors kept in the dark by the police (and not negligent in failing to hire other persons to investigate the police) won't improve their conduct with or without

> legal liability for their conduct. Requiring culpable officers to pay damages to the victims of their actions, however, holds out promise of both deterring and remediating violations of the Constitution.

App., *infra* at 17a. Thus, the court held that *Brady* imposes a duty of disclosure on police officers not to "withhold from prosecutors exculpatory information." *Id.* By holding that police can be held liable whenever they "withhold from prosecutors exculpatory information" (*id.*), the court of appeals effectively imposed a duty of disclosure on police—because whenever they fail to ensure that all exculpatory information comes to the attention of prosecutors, a trier of fact will be free to hold investigators liable for a *Brady* violation.

The Seventh Circuit's extension of the *Brady* obligation to police is inconsistent with *Brady* itself. The obligation imposed by *Brady* rests with prosecutors, not the police. This Court has explained that while *Brady* applies to information known to the police, it is the duty of the prosecutor, not the police officer, to identify and disclose exculpatory evidence known to investigators: "[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Kyles v. Whitely*, 514 U.S. 419, 437 (1995). Accord, *e.g.*, *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). And this view of the *Brady* obligation makes good sense. Police officers are not lawyers; they have limited ability to discern what evidence might be considered impeaching or otherwise exculpatory at trial.

Following this analysis, the Fifth Circuit has squarely held that the duty to disclose exculpatory evidence recognized in *Brady* does not extend to police officers. In *Mowbray v. Cameron County*, 274 F.3d 269 (5th Cir. 2001), cert. denied, 535 U.S. 1055 (2002), the plaintiff, whose murder conviction had been overturned, sought civil damages from a police

officer and police lab technician based upon a claim that the defendants had violated their *Brady* duty "to disclose exculpatory evidence." *Id.* at 277. The court flatly rejected the plaintiff's claim, stating that there exists "no case extending *Brady* to police officers or lab technicians." *Id.* at 278. Along the same lines, six judges of the Fourth Circuit have concluded that "to speak of the duty binding police officers as a *Brady* duty is simply incorrect." *Jean v. Collins*, 221 F.3d 656, 660 (4th Cir. 2000) (en banc) (Wilkinson, J., concurring in the judgment), cert. denied, 531 U.S. 1076 (2001). The opinion elaborates:

> The *Brady* duty is framed by the dictates of the adversary system and the prosecution's legal role therein. Legal terms of art define its bounds and limits. The prosecutor must ask such lawyer's questions as whether an item of evidence has "exculpatory" or "impeachment" value and whether such evidence is "material." It would be inappropriate to charge police with answering these same questions, for their job of gathering evidence is quite different from the prosecution's task of evaluating it. This is especially true because the prosecutor can view the evidence from the perspective of the case as a whole while police officers, who are often involved in only one portion of the case, may lack necessary context. To hold that the contours of the due process duty applicable to the police must be identical to those of the prosecutor's *Brady* duty would thus improperly mandate a one-size-fits-all regime.

Ibid. See also *Walker v. City of New York*, 974 F.2d 293, 299 (2d Cir. 1992), cert. denied, 507 U.S. 961 & 972 (1993).

To be sure, we do not doubt that a police officer can be held liable when he deliberately obstructs a prosecutor's effort to identify and disclose exculpatory information known to the police. This is the standard that a number of circuits have articulated for imposing liability on police officers for a malicious prosecution based on police suppression of exculp-

atory evidence. See, *e.g.*, *Gallo v. City of Philadelphia*, 161 F.3d 217, 218-22 (3d Cir. 1998); *Hart v. O'Brien*, 127 F.3d 424, 446 (5th Cir. 1997); *Sutkiewicz v. Monroe County Sheriff*, 110 F.3d 352, 358 (6th Cir. 1997). And, in the particular context of a *Brady* claim against police officers, six judges of the Fourth Circuit have concluded that a plaintiff must prove "concealment, doctoring, or destruction of evidence . . . ." *Jean*, 221 F.3d at 663 (Wilkinson, J., concurring in the judgment). There is no basis, however, to hold, as the Seventh Circuit did here, that a police officer has deprived an accused of his right to a fair trial merely because they have "withh[e]ld from prosecutors exculpatory information . . . ." App., *infra* at 17a.

In response to the Seventh Circuit's original opinion in the interlocutory appeal, we petitioned for rehearing, arguing that only affirmative obstruction of the prosecution's investigation can be enough to impose liability on a police officer for depriving an accused of the right to a fair trial. In its supplemental opinion denying rehearing, however, the court of appeals still failed to articulate the proper standard. While the court acknowledged that "police need not spontaneously reveal to prosecutors every tidbit that with the benefit of hindsight (and in the context of other evidence) could be said to assist defendants" (App., *infra* at 19a-20a), it added that the withholding of information, at least when deliberate, is sufficient to impose liability: "[I]f the right characterization of the defendants' conduct is that they deliberately withheld information, seeking to misdirect or mislead the prosecutors and the defense, then there is a genuine constitutional problem," App., *infra* at 20a. But, however tempting it may have been for the court of appeals to impose liability based on what it deemed to be bad faith by police, that approach has no support in *Brady*.

Brady and its progeny make motivation irrelevant; the Due Process Clause forbids convictions that rest on the suppres-

sion of exculpatory evidence regardless of whether the failure to disclose was innocent or in bad faith. See, *e.g.*, *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Brady*, 373 U.S. at 87. The absolute nature of the *Brady* obligation imposed on prosecutors appropriately protects the right to a fair trial even with respect to information known only to the police, since "[t]he prosecutor bears the responsibility for implementing procedures designed to ensure that police officers turn over all evidence to him." *Jean*, 221 F.3d at 661 (Wilkinson, J., concurring in the judgment) (citation omitted). It follows that, regardless of their motives, if the police do nothing to prevent prosecutors from discharging their obligation to identify and disclose exculpatory information, they do not run afoul of *Brady*. But, by making liability turn on investigators' subjective motivation, as the Seventh Circuit has done, the trier of fact is left free to infer an improper motive in virtually every case in which the police fail to disclose exculpatory information to the prosecutors, even in cases like this one, in which there is no evidence that the detectives provided any false information to the prosecutors about any coaching that may have preceded the eyewitnesses' identification of Newsome. Indeed, here there is no evidence that the prosecutors ever interviewed the detectives about allegations of impermissible coaching—an omission that is understandable given Newsome's failure to press any claim of impermissible coaching during pretrial hearings in the underlying criminal case. In fact, it was some two decades after trial that Newsome first advanced his claim that he saw the detectives coaching Nash as she viewed the lineup.

c. By establishing an improper standard for due process liability, the court of appeals' holding in the interlocutory appeal required the detectives to go to trial under that improper standard—the district court's instructions to the jury did not require a finding that Detectives McCabe and McNally affirmatively obstructed the prosecutors from discharging their own *Brady* obligation. Instead, following

the court of appeals' erroneous holding, the district court charged the jury that it could return a verdict for Newsome as long as it found that the detectives "deliberately concealed or failed to disclose . . . exculpatory evidence . . . ." Tr. 1133. And, the court of appeals, in its opinion upholding the jury's $15 million award, refused to retreat from its prior position, concluding that we had preserved our arguments "for presentation to a higher court, but in this tribunal they are barred by the law of the case." App., *infra* at 2a.[5] And while the court of appeals noted that Rounds' testimony at trial about the detectives' "perjury or contempt" warning suggested that "the officers threatened him with imprisonment if he told the prosecutors what actually happened at the lineup" (App., *infra* at 3a), we cannot know whether the jury credited this testimony, since its instructions did not require it to find that detectives obstructed the prosecutors' efforts to discharge their *Brady* obligations. In any event, as we note above, there was no evidence that the prosecutors even inquired into the circumstances surrounding the identifications, much less evidence that their inquires were frustrated by police misconduct.

d. In fact, under the proper standard, this case never should have gone to trial; the court of appeals should have granted the detectives qualified immunity in its first opinion.[6]

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[5] While the law of the case established by the court of appeals in the interlocutory appeal bound the district court, and was followed by the Seventh Circuit in the subsequent appeal, "a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988).

[6] This petition for certiorari properly places at issue the decision of the court of appeals in the interlocutory appeal, since this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *Major League Baseball Players Association v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). Accord, *e.g.*, *Mercer*

Public officials are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A court considering a claim for qualified immunity should therefore "determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Harlow*, 457 U.S. at 818. Accord, *e.g.*, *Saucier v. Katz*, 533 U.S. 194, 200-02 (2001); *Wilson*, 526 U.S. at 609. In this case, the court of appeals denied qualified immunity by citing two precedents, *Brady* and *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988). But *Brady* is of no relevance to the qualified immunity inquiry because *Brady* imposes no obligations on police officers, as we explain above.

As for *Jones*, in that case the Seventh Circuit discussed *Brady* in the course of evaluating the claim against the City itself, based on a police practice of maintaining "street files" that were unavailable to prosecutors. See 856 F.2d at 995-96.[7] But the court cautioned that it "d[id] not reach the

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v. Theriot, 377 U.S. 152, 153-54 (1964) (per curiam); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916). Indeed, it is the ordinary practice of this Court to forgo review prior to final judgment, notwithstanding this Court's jurisdiction to review interlocutory judgments. See, *e.g.*, *Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (per curiam).

[7] In *Jones*, the plaintiff's claims did not rest on the right to a fair trial, since the charges against him were dropped before his trial concluded. See 856 F.2d at 991. And, against the individual officers, *Jones* recognized only a Fourth Amendment claim based on Jones' arrest without probable cause, and did not establish a legal obligation on police officers to disclose exculpatory evidence. See *id.* at 992. Nor did the court have any occasion to consider whether or when any *Brady* obligation on police officers had been sufficiently clearly established to deny qualified immunity in *Jones*. The *Brady* claim was made only against the City

question whether damages could ever be awarded for . . . a [*Brady*] violation." *Id.* at 996. More important, *Jones* was not decided until some nine years after the events at issue here, and hence could not have established the scope of the *Brady* obligation as of the time of Newsome's prosecution. Instead, at that time, police detectives reasonably could have believed that it was the responsibility of the prosecutors, not the officers themselves, to determine if eyewitness identifications were sufficiently reliable for use at trial and, if so, whether any exculpatory information relating to those identifications must be disclosed to the defense. After all, it was settled in 1979 that even when a lineup identification is tainted by impermissible coaching, in-court identifications are admissible if the witness has an independent basis on which to make the identification. See, *e.g.*, *Manson v. Braithwaite*, 432 U.S. 98 (1977). Thus, if during the lineup the detectives engaged in impermissible coaching, or worse, they could nevertheless have reasonably believed that the prosecutors might independently find the eyewitness testimony sufficiently reliable to use against Newsome, and they were not on fair notice that they faced liability if a trier of fact concluded that they had "deliberately" withheld exculpatory evidence.

Nor does the testimony that the court of appeals identified as suggesting that the detectives threatened Rounds (App., *infra* at 3a) suffice to deprive them of qualified immunity. Rounds' brief testimony on this point does not describe any express threat or demand that Rounds not tell prosecutors the truth. The detectives' statement, by its terms, was only a warning that if Rounds recanted his identification—by testifying that Newsome was not the man he saw murder Cohen or refusing to testify altogether—he would face perjury or

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itself (see *id.* at 995-96), and municipalities may not assert the defense of qualified immunity. See *Owen v. City of Independence*, 445 U.S. 622 (1980).

contempt charges. This type of warning is frequently given to witnesses—especially potentially recalcitrant witnesses to violent crimes—advising them that if they alter their account, they may be charged with perjury, and if they refuse to testify, they may face contempt charges. While Rounds evidently construed the warning as a threat or demand that he lie to prosecutors, that is not sufficient to impose liability. Certainly no precedent available at the time of Newsome's prosecution would have put the detectives on fair notice that the type of warning described by Rounds violated the Due Process Clause.

Even more important, the extent to which police officers can be charged with knowledge of their own constitutional obligation under *Brady* is a point on which there is considerable disarray, if not outright conflict, in the lower courts. As we explain above, the Fifth Circuit has stated that it is aware of "no case extending *Brady* to police officers." *Mowbray*, 274 F.3d at 278. And six judges of the Fourth Circuit, after surveying the precedents around the country, including the Seventh Circuit's decision in *Jones*, concluded that the "cases have left unclear the exact nature of any duty that the law imposes on police with respect to exculpatory evidence." *Jean*, 221 F.3d at 659 (Wilkinson, J., concurring in the judgment). Thus, the disarray in the lower courts on whether police officers are under any clearly established *Brady* obligation warrants plenary review of the Seventh Circuit's decision in this case.

2. There is also disarray in the lower courts on the question whether investigators are entitled to absolute immunity for procuring testimony subsequently proven to be false. On this issue as well, plenary review is warranted.

a. Police officers are entitled to absolute immunity from civil liability when they undertake "functions 'intimately associated with the *judicial* phase of the criminal process.'" *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (quoting *Imbler v.*

Pachtman, 424 U.S. 409, 430 (1976)). One such function is testifying; in *Briscoe v. LaHue*, 460 U.S. 325 (1983), this Court held that police officers have absolute immunity from civil liability for their allegedly false or perjurious testimony. See *id.* at 342-44. The lower courts, however, have struggled without success to develop a uniform approach to the application of absolute immunity to pretrial conduct that culminates in testimony later found to be false or perjurious.

In the decision below, the court of appeals held that the detectives lacked absolute immunity because "their liability is under the due process clause because they concealed exculpatory evidence—the details of how they induced the witnesses to finger Newsome." App., *infra* at 5a. That holding is in conflict with the decision in the First Circuit in *Watterson v. Page*, 987 F.2d 1 (1st Cir. 1993), that absolute immunity reached allegations of an effort to "withhold material evidence from the court . . . ." *Id.* at 9. In fact, the conflict in the circuits is not limited to the precise question whether absolute immunity extends to allegations about the withholding of material evidence; the circuits have been unable to agree on a variety of issues involving the application of absolute testimonial immunity to pretrial conduct.

For example, in *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999), the Eleventh Circuit held that a police detective's alleged subornation of perjury by a civilian witness was protected by absolute immunity. See *id.* at 1288-89. As the court explained, "[t]o allow a § 1983 claim based on the subornation of perjured testimony where the allegedly perjured testimony itself is cloaked in absolute immunity would be to permit through the back door what is prohibited through the front." *Id.* at 1289. By contrast, in *Spurlock v. Satterfield*, 167 F.3d 995 (6th Cir. 1999), in which the plaintiff alleged that a deputy sheriff suborned perjurious testimony from a witness (see *id.* at 1002), the Sixth Circuit rejected the deputy's claim to absolute immunity, concluding

that the fact that the deputy pressured a witness named Apple to testify falsely "ultimately resulting in absolutely immunized action—Apple's testimony—does not make those underlying actions covered by absolute immunity." *Ibid.* Thus, the Sixth and Eleventh Circuits cannot agree on whether subornation of perjury is immunized.

Similarly, there is a conflict on whether a pretrial conspiracy to present perjured testimony is immunized. Some nine circuits have recognized immunity in these cases. See *Mowbray*, 274 F.3d at 277; *Franklin v. Terr*, 201 F.3d 1098, 1101-03 (9th Cir. 2000); *Jones v. Cannon*, 174 F.3d at 1288-89; *Hunt v. Bennett*, 17 F.3d 1263, 1267-68 (10th Cir.), cert. denied, 513 U.S. 832 (1994); *Watterson*, 987 F.2d at 9; *McArdle v. Tronetti*, 961 F.2d 1083, 1085-86 (3d Cir. 1992); *House v. Belford*, 956 F.2d 711, 720-21 (7th Cir. 1992); *Alioto v. City of Shiveley*, 835 F.2d 1173, 1174 (6th Cir. 1987); *Moses v. Parwatikar*, 813 F.2d 891, 892-93 (8th Cir.), cert. denied, 484 U.S. 832 (1987). For example, in *Mowbray*, the Fifth Circuit reasoned: "As a matter of logic, a person may not be prosecuted for conspiring to commit an act that he may perform with impunity." 274 F.3d at 277 (citation and internal quotations omitted). But the Second Circuit has reached a contrary conclusion, holding that persons who allegedly conspire to present false testimony do not receive immunity. See *Dory v. Ryan*, 25 F.3d 81 (2d Cir. 1994); *San Filippo v. U.S. Trust Co. of New Jersey, Inc.*, 737 F.2d 246, 254-55 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985).

This case provides a useful vehicle to address the fundamental disagreement in the circuits about the scope of absolute immunity. The view in many circuits that since testimony itself is immunized, investigators cannot be sued for their role in facilitating the commission of an immunized act has been rejected by the Second, Sixth and Seventh

Circuits.[8] Plenary review is warranted to address the disarray in the lower courts on the application of absolute immunity to pretrial conduct aimed at producing testimony later found to be false, misleading or incomplete.

b. The approach to absolute immunity taken by the court of appeals in this case is also incorrect, for two reasons.

First, the acts for which the jury imposed liability qualify for absolute immunity because they involve "functions 'intimately associated with the *judicial* phase of the criminal process.'" *Malley*, 475 U.S. at 342 (quoting *Imbler*, 424 U.S. at 430). It is settled that prosecutors enjoy absolute immunity, despite their obligation under *Brady*, for "the alleged deliberate suppression of exculpatory evidence." *Burns v. Reed*, 500 U.S. 478, 486 (1991). See, *e.g.*, *Kalina v. Fletcher*, 522 U.S. 118, 123-29 (1997); *Imbler*, 424 U.S. at 413-16, 430-31. This case involves the very same function; it went to trial on a claim that the detectives "concealed exculpatory evidence." App., *infra* at 5a. To the extent that the *Brady* obligation of prosecutors is extended to the police, surely they are exercising a function no less "intimately" associated with the judicial phase of the criminal process than when *Brady* is applied to prosecutors. Cf. *Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring) (suggesting that if a section 1983 claim against police officers for malicious prosecution can be brought then officers "may be entitled to share the prosecutor's absolute immunity"). After all, the *Brady* obligation is not part of the investigative process; it is directed at "'the *judicial* phase of the criminal process.'" *Malley*, 475 U.S. at 342 (quoting *Imbler*, 424 U.S. at 430). That should be obvious in light of the rule that "suppression of evidence

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[8] For a helpful discussion (albeit predating the decision below) on the extent of the disarray in the lower courts on the scope of absolute testimonial immunity, see *Mitchell v. City of Boston*, 130 F. Supp. 2d 201, 209-13 (D. Mass. 2001).

amounts to a constitutional violation only if it deprives the defendant of a fair trial." *United States v. Bagley*, 473 U.S. 667, 678 (1985). Cf. *Landrigan v. City of Warwick*, 628 F.2d 736, 744 (1st Cir. 1980) ("We do not see how the existence of a [falsely inculpatory] police report, sitting in a drawer in a police station, by itself deprives a person of a right secured by the Constitution and laws.").

Second, the court of appeals' effort to distinguish between claims involving the procuring of false testimony and a failure to disclose exculpatory evidence is thoroughly unpersuasive. The Seventh Circuit held that "McCabe and McNally were not held liable for conspiring with the eyewitnesses to commit perjury; their liability is under the due process clause because they concealed exculpatory evidence." App., *infra* at 5a. This is little short of sophistry. Claims based on a police officer's subornation or participation in a conspiracy to adduce perjurious testimony can always be recharacterized as a claim for the failure to disclose exculpatory evidence—the exculpatory evidence being, of course, facts suggesting that a prosecution witness was induced to lie. Thus, a *Brady* exception to immunity would effectively swallow even the rule that a police officer's own testimony is immunized, since a section 1983 plaintiff can refashion even a claim based on alleged police perjury as a claim that the officer withheld exculpatory information.[9] This Court made that very point in *Imbler*, when it extended prosecutorial immunity not only to a prosecutor's

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[9] Indeed, the Seventh Circuit applies its *Brady* exception to absolute immunity even in cases in which it was the police officer's own testimony that was used to convict the criminal defendant turned section 1983 plaintiff. See *Ienco v. City of Chicago*, 286 F.3d 994, 1000 (7th Cir), cert. denied, 123 S. Ct. 581 (2002).

presentation of evidence, but also to the prosecutor's failure to disclose exculpatory evidence prior to trial. The Court reasoned:

> A claim of using perjured testimony may simply be reframed and asserted as a claim of suppression of the evidence upon which the knowledge of perjury rested . . . . Denying absolute immunity from suppression claims could thus eviscerate, in many situations, the absolute immunity from claims of using perjured testimony.

424 U.S. at 431 n.34. Indeed, the circuits that have extended absolute immunity to pretrial conduct have generally done so based on their recognition that an exception to immunity for pretrial conduct that is directed at procuring evidence for use at trial is likely, in practical effect, to swallow the rule. See, *e.g.*, *Mowbray*, 274 F.3d at 277; *Franklin*, 201 F.3d at 1101; *Jones*, 174 F.3d at 1289.[10]

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[10] The court of appeals also suggested that the detectives' conduct cannot be fairly characterized as producing an immunized act (the eyewitnesses' testimony) because "[b]y the time of trial, Rounds, Nash, and Williams may have sincerely believed that Newsome was the murderer" and therefore "[t]hey did not need immunity." App., *infra* at 5a. But this is just wrong. Absolute testimonial immunity is based on the privilege that the common law afforded witnesses against defamation liability. See *Briscoe*, 460 U.S. at 330-34. Under Illinois law, defamation liability attaches whenever an individual makes an unprivileged communication of a false and defamatory statement about another. See, *e.g.*, *Krasinski v. United Parcel Service, Inc.*, 530 N.E.2d 468, 490 (Ill. 1988). See also Restatement (Second) of Torts § 558 (1977). Alleging that the plaintiff has committed a crime is considered defamatory per se. See, *e.g.*, *Van Horne v. Muller*, 705 N.E.2d 898, 903 (Ill. 1998). See also Restatement (Second) of Torts § 571 (1977). There is accordingly no basis for the court of appeals' view that the eyewitnesses had no need for immunity as long as they believed that their testimony was truthful; absent immunity, the witnesses faced defamation liability if their testimony was false in fact, regardless of whether they believed it to be true. In any event, the court of appeals' observation that the eyewitnesses may honestly have

3. The importance of the question presented by this case cannot be overstated.

In *Briscoe*, this Court predicted that if section 1983 plaintiffs could obtain damages against police officers based on their role in producing allegedly unconstitutional convictions—even if liability were limited to cases in which the conviction had already been overturned—the ensuing litigation would place enormous burdens on both the judicial systems and the law enforcement function. See 460 U.S. at 342-45. In particular, the Court observed that "police officers testify in scores of cases every year, and defendants will often transform resentment at being convicted into allegations of perjury by the state's official witnesses." *Id.* at 343. The Court added that cases alleging the use of false testimony will frequently require trial, since the complaint will be based on the defendants' "knowledge and state of mind," and "[s]ummary judgment is usually not feasible under these circumstances." *Id.* at 343 n.29. The holdings of the Seventh Circuit in this case impose the very type of burden from which this Court sought to spare the law enforcement community in *Briscoe*—those who are acquitted or whose convictions are overturned will frequently believe that the witnesses against them lied, and can circumvent both the witnesses' and the prosecutors' immunity by placing at issue the knowledge and intent of the investigators. The resulting civil litigation, based on allegations of wrongful failure to disclose exculpatory information to prosecutors, "could well

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believed their testimony in the criminal proceedings fails to take account of the irreconcilable conflict between that testimony and the testimony at the civil trial about improper coaching of witnessses. If Rounds' current testimony is credited, then his testimony in the criminal proceedings that the police engaged in no coaching is necessarily perjurious. And if Newsome's current testimony that he saw police coaching Nash is credited, then her testimony in the criminal proceedings that there was no coaching was likewise perjurious.

set up a continual exercise in finger-pointing between prosecutors and police over whose fault it was that the evidence never reached the defendant." *Jean*, 221 F.3d at 661 (Wilkinson, J., concurring in the judgment).

Wrongful convictions are tragic and regrettable, but they do occur, and because of the absolute immunity that prosecutors and witnesses alike enjoy from liability under section 1983, civil rights plaintiffs have made increasingly bold efforts to sue police officers when convictions are overturned. Surely the staggering volume of litigation that would likely be brought against law enforcement officials based upon the *Brady* theory of liability recognized by the Seventh Circuit must, at a minimum, distract those officials from their important duties, and divert scarce public resources away from crime fighting to the defense of civil litigation. Indeed, if anything, the *Briscoe* decision may have underestimated the extent of the litigation that will result if the immunity holdings below stand. The advent of DNA testing has brought with it a dramatic increase in the number of convictions that are overturned. See, *e.g.*, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547 (2002). Exonerated individuals, naturally enough, frequently seek compensation, but under state law only modest compensation, if any, is generally available. See, *e.g.*, Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days To Execution and Other Dispatches from the Wrongly Convicted* 228-32 (2000). In contrast, as the size of the judgment in this case illustrates, section 1983 offers plaintiffs seeking to recover for wrongful prosecutions and convictions the hope of enormous damages awards in their favor.

The decision of the court of appeals will accordingly stimulate an immense volume of litigation on the basis of a theory of liability about which other circuits have expressed considerable doubts, and which is in significant tension with

this Court's own decisions. Public officials exposed to this potential liability, and section 1983 plaintiffs themselves, can only benefit if this Court now provides authoritative guidance on the extent to which section 1983 permits the recovery of damages for wrongful prosecutions and convictions. Surely it is in the interests of justice for this Court to assess the theory of liability that the court of appeals has announced in this case, in order to avoid what may well prove to be years of expensive, burdensome, and ultimately wasted litigation should this Court ultimately take a different view than is reflected in the decisions below. Plenary review is amply warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation
Counsel
JANE ELINOR NOTZ
Assistant Corporation Counsel
City Hall, Room 600
Chicago, Illinois 60602
(312) 744-5337

Attorneys for Petitioners

* Counsel of Record